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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Nos. 00-6047 and 00-6068

TRIGEN-OKLAHOMA CITY ENERGY CORPORATION,

Plaintiff-Appellee/Cross-Appellant,

v.

OKLAHOMA GAS & ELECTRIC COMPANY,

Defendant-Appellant/Cross-Appellee,

EDISON ELECTRIC INSTITUTE,

Amicus Curiae.

Appeal from the United States District Court
for the Western District of Oklahoma
(D.C. No. 96-CV-1595-L)

[Filed April 3, 2001]

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Chaney, Oklahoma City, OK, on the briefs), for Plaintiff-Appellee-Cross-Appellant.

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Barbara A. Hinden (Edward H. Comer, on the brief), Edison Electric Institute, Washington, DC, for Amicus Curiae.

Before KELLY and BRISCOE, Circuit Judges, and MURGUIA*, District Judge.

Paul KELLY, Jr., Circuit Judge.

Trigen-Oklahoma Energy Corp. ("Trigen") sued Oklahoma Gas & Electric ("OG&E") in federal district court, alleging violations of the federal antitrust laws, Oklahoma antitrust laws, and Oklahoma tort law. A jury returned a verdict for Trigen on all counts except attempted monopolization, 15 U.S.C. § 2. The court awarded Trigen over $20 million in damages. OG&E appeals the jury's verdict and Trigen cross-appeals the damages award. We have jurisdiction pursuant to 28 U.S.C. § 1291. Because we find that OG&E is immune from federal antitrust liability under the state action doctrine and that Trigen's remaining claims are within the exclusive jurisdiction of the Oklahoma Corporation Commission ("OCC"), we reverse.

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* The Honorable Carlos Murguia, District Judge, United States District Court of Kansas, sitting by designation.

Background

A. The Parties

Appellant-Defendant Oklahoma Gas & Electric Co. ("OG&E") is a regulated electric utility that serves communities in Oklahoma and Arkansas. The OCC and the Arkansas Public Service Commission regulate the rates, terms, and conditions for OG&E's retail electricity sales. The Federal Energy Regulatory Commission regulates OG&E's wholesale electricity sales. Aplt. Br. at 8.

Trigen, a wholly-owned subsidiary of Trigen Energy Corporation, operates urban and industrial "district heating-and-cooling systems" around the country. VI Aplt. App. at 1181-82. In 1989, Trigen entered the Oklahoma City market by acquiring district heating-and-cooling plants from another company. At its plants, Trigen produces steam and chilled water, which are then pumped from a central station through Trigen's underground pipeline to Trigen's customers. In order to use Trigen's system, buildings must be accessible to Trigen's underground pipeline. Trigen's Oklahoma City sales are not regulated. *Id.* at 8-9.

OG&E and Trigen compete indirectly in Oklahoma City. OG&E attempts to persuade Trigen's customers to purchase cooling equipment ("chillers") from a third party and install it in the customers' buildings. Buildings that use electric chillers consume more electricity for cooling than buildings served by Trigen. Obviously, buildings with electric chillers for cooling also do not need Trigen's services. *Id.* at 9; Aplee. Br. at 3. Significantly, without a chiller, OG&E's electricity is not a substitute for Trigen's district-cooling system. OG&E only sells electricity -- it does not manufacture or sell chillers. OG&E also has no control over its electricity prices as its rates are set by the OCC. Aplt. Br. at 10.

B. The Conduct at Issue

At trial, Trigen sought twenty years of lost profits from OG&E based on three allegedly anticompetitive incidents. First, Trigen and OG&E competed for Oklahoma County's buildings. The County had originally signed a contract with Trigen in December 1989. However, this contract lapsed at the end of every fiscal year, as the Oklahoma Constitution prohibits political subdivisions from entering into contracts exceeding one fiscal year. I Aplt. Sep. Add. Ex. 85, ¶¶ 2-3. In 1993, the County Board became dissatisfied with Trigen's rates and began to investigate installing on-site electric chillers. OG&E conducted a study for the County that concluded the County could save significant amounts of money by installing on-site chillers. Convinced by the study, the County Board began negotiations with Trigen, with Trigen ultimately agreeing to reduce the County's capacity charge by about $200,000 annually. At trial, Trigen sought to regain these "lost profits" as damages from OG&E. Aplt. Br. at 17-18; Aplee. Br. at 5-7.

Second, OG&E and Trigen competed to win the contract to serve the City's Myriad Convention Center. The City ultimately selected OG&E, after OG&E offered to include the City in the experimental Real Time Pricing ("RTP") tariff recently approved by the OCC. Aplt. Br. at 18. Under the RTP tariff, the customer is given a schedule of hourly prices a day (or a week) in advance, and the customer may adjust its usage accordingly. *Id.* at 20. The OCC's approval of the RTP program gave OG&E complete discretion to select customers. *Id.* An outside consulting firm, hired by OG&E, estimated (but did not guarantee) that by using RTP, the City could achieve an average rate of 1.8 cents per kilowatt-hour. *Id.* at 21. Trigen contends that OG&E misrepresented the RTP rate to the City. Aplee. Br. at 32-36. Again, Trigen sought lost profits as damages from OG&E.

Third, and finally, OG&E and Trigen competed for the

business of Corporate Tower, a non-governmental building. Trigen succeeded to the Corporate Tower contract when it entered the Oklahoma City market in 1989. Corporate Tower's contract with Trigen had a primary term of ten years, with two five-year renewal periods. Aplt. Br. at 25; II Sep. Add. Ex. DX5A at ¶ 2. The first of these renewal periods expired in September 1995. In anticipation of that expiration, OG&E attempted to persuade Corporate Tower to install an on-site cooling system. To this end, OG&E provided information to the building manager on how to evaluate on-site cooling, offered to pay for a feasibility study, sponsored an informational breakfast meeting and an energy conference, and had its lawyers evaluate Corporate Tower's contract with Trigen for legal termination options. Aplt. Br. at 24-26. Corporate Tower decided to terminate its relationship with Trigen at the end of the first contract-renewal period and install on-site chillers and heaters. At trial, Trigen sought to recover twenty years of lost profits from the loss of Corporate Tower's business based on the assumption that, but for OG&E, Trigen would have received a twenty-year contract extension. *See* I Sep. Add. Ex. PX515.

C. The Litigation

In September 1996, Trigen filed this action in federal district court alleging monopolization and attempted monopolization in violation of § 2 of the Sherman Act, 15 U.S.C. § 2; unreasonable restraint of trade and discrimination in violation of Okla. Stat. tit. 79, §§ 1, 4; and tortious interference with contract and prospective business advantage. I Aplt. App. Doc. 2 (First Am. Compl.). The trial took place in December 1998, and the jury returned a verdict for Trigen on all counts except attempted monopolization. III Aplt. App. Doc. 23. OG&E made three motions for judgment as a matter of law: during trial, XI

Aplt. App. at 3024-38, at the close of all the evidence, XII Aplt. App. at 3151, and after the jury verdict, IV Aplt. App. Doc. 35. The trial court denied the motions. XI Aplt. App. at 3072; XII Aplt. App. at 3151; V Aplt. App. Doc. 47. In January 2000, the trial court trebled the damages award and entered judgment for $20,641,548 against OG&E. V Aplt. App. Doc. 48.

Discussion

Trigen brought federal antitrust claims against OG&E, as well as state antitrust and tort claims. OG&E argues that a combination of the state action, *Noerr-Pennington,* and filed rate doctrines mandate that the court dismiss both the federal and state antitrust claims against it. OG&E also argues that the district court had no jurisdiction to hear the state tort claims against OG&E as the exclusive jurisdiction to hear such claims rests with the OCC. Because we hold that the state action doctrine mandates the dismissal of the federal antitrust claims, and that the state antitrust and tort claims are within the exclusive jurisdiction of the OCC, we decline to reach the *Noerr-Pennington* and filed rate doctrine defenses. Nor is it necessary to address OG&E's arguments concerning reversible error at trial, the damages award, or Trigen's cross-appeal.

A. The State Action Doctrine

OG&E contends that the state action doctrine immunizes its conduct from federal antitrust scrutiny in three ways: (1) all of Trigen's claims are based on OG&E's efforts to sell electricity, and OG&E's electricity sales are immune from antitrust actions because the State has chosen to regulate them; (2) OG&E's offer to the City to participate in OG&E's pilot RTP program falls within the state action doctrine because the OCC expressly approved the RTP tariffs; and (3)

the decisions of the City and County on whether or not to contract with Trigen are immune from antitrust actions, and this immunity extends to OG&E. Aplt. Br. at 32-33.

We see no significant legal difference between OG&E's first two grounds for state action immunity. The RTP program in which OG&E offered to enroll the City is just another state-regulated electricity sale. Therefore, we will treat OG&E simply as arguing that all of its regulated electricity sales are protected by the state action doctrine. This argument, standing alone, is enough to mandate dismissal of the federal antitrust claims. Accordingly, we need not address OG&E's third contention, that the City's and County's immunity under the state action doctrine should extend to OG&E.

At the outset, we must deal with the issue of waiver. Based on arguments that OG&E made at trial, Trigen argues that OG&E has waived state action immunity except with respect to OG&E's offer of the RTP rate to the city. *See* XI Aplt. Ap. at 3031; VI Aplt. App. at 1246. We disagree. Based on our review of the entire record, we find the issue of state action immunity to be pervasive throughout the litigation. OG&E clearly raised the issue of state action immunity as applying to all of its regulated electricity sales in its answer, I Aplt. App. Doc. 3, ¶ 84, in the final pre-trial order, III Aplt. App. Doc. 26, ¶¶ 4G, 5B1, 5B6, and 5B11, and in its final motion for judgment as a matter of law. IV Aplt. App. Doc. 35, ¶ 1. Significantly, in its order denying OG&E's motion, the district court did not hold that OG&E had waived state action immunity but denied the motion on the merits, albeit without analysis. V Aplt. App. Doc. 47 at 2. When first confronted with this issue during trial, the district court recognized that it could be dispositive of the entire case and queried why it was not raised in a motion for summary judgment. VI Aplt. App. at 1246. Although we agree that it is difficult to understand why OG&E did not file a dispositive motion prior to trial based on state action

immunity, OG&E was not required to do so. Finally, state action immunity is a purely legal issue and Trigen has shown no prejudice due to OG&E's alleged waiver. Therefore, under these specific circumstances, we hold that OG&E did not waive its state action immunity.

We turn to the merits of OG&E's state action immunity claim. Because Oklahoma has clearly articulated a policy to displace competition with the regulation of electric utilities and because Oklahoma actively supervises any allegedly anticompetitive conduct, the state action doctrine immunizes OG&E's regulated electricity sales from federal antitrust scrutiny. State action immunity is a question of law, which the court reviews de novo. *In re Overland Park Fin. Corp.*, 236 F.3d 1246, 1251 (10th Cir. 2001). The state action doctrine arises from *Parker v. Brown*, 317 U.S. 341, 350-52 (1943), in which the Supreme Court relied on principles of federalism and state sovereignty to hold that the Sherman Act was not intended to prohibit states from imposing restraints on competition. In *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), the Supreme Court set forth a two-pronged test for determining when private parties regulated by the state are shielded from the federal antitrust laws. First, the challenged restraint must be "one clearly articulated and affirmatively expressed as state policy," *id.* at 105 (internal quotations and citation omitted), and second, "the policy must be 'actively supervised' by the State itself." *Id.*

In order to meet the first prong of the *Midcal* test, a private party does not have to "point to a specific, detailed legislative authorization" for its challenged conduct; the State need only have made clear its intent to replace competition with a regulatory program in a particular field. *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 64 (1985) (internal quotations and citation omitted). In addition, the state policy does not have to compel the private party to engage in anticompetitive

conduct. If the state policy expressly permits, but does not compel, anticompetitive conduct, the private party may still qualify for state action immunity. *Id.* at 61-62.

The second prong of the *Midcal* test, the "active supervision" requirement, "is designed to ensure that the state-action doctrine will shelter only the particular anticompetitive acts of private parties that, in the judgment of the State, actually further state regulatory policies." *Patrick v. Burget,* 486 U.S. 94, 100-01 (1988) (citation omitted). The active supervision requirement "mandates that the State exercise ultimate control over the challenged anticompetitive conduct." *Id.* at 101.

As a state-regulated utility, OG&E has clearly met the two-prong test for state action immunity. The Oklahoma Constitution manifests the State's intent to displace competition with regulation over electric utilities. The Oklahoma Constitution creates the OCC, Okla. Const. art. IX, § 15, and provides that the OCC "shall have the power and authority and be charged with the duty of supervising, regulating and controlling all . . . transmission companies doing business in this State, [and] in all matters relating to the performance of their public duties and their charges therefor . . . ." Okla. Const. art. IX, § 18. To that end, the OCC "shall . . . prescribe and enforce against such companies . . . such rates, charges, . . . and rules and regulations, and shall require them to establish and maintain all such public service, facilities, and conveniences as may be reasonable and just . . . ." *Id.* Any rates, charges, or rules and regulations that are inconsistent with those mandated by the OCC are "unlawful and void." *Id.* We have previously recognized Oklahoma's intent to displace competition with the regulation of public utilities, holding that the state action doctrine immunized an Oklahoma electric utility from antitrust scrutiny in the market for leased outdoor lighting. *Lease Lights, Inc. v. Public Service Co. of Okla.,* 849 F.2d 1330, 1333 (10th Cir. 1988) ("The Oklahoma Constitution

gives the [OCC] the power to regulate public utilities . . . .").

The OCC also actively supervises OG&E, meeting the second part of the test for state action immunity. The OCC has "general supervision" over OG&E, including the power to fix all of OG&E's rates for electricity and to promulgate all the rules and regulations that affect OG&E's services, operation, and management. Okla. Stat. tit. 17, § 152(A). The OCC has "full visitorial and inquisitorial power to examine such public utilities," § 152(C), as well as "the powers and authority of a court of record," Okla. Const. art. IX, § 19, with exclusive jurisdiction over claims challenging any of the OCC's actions. Okla. Const. art. IX, § 24. In *Lease Lights,* we found that the use of similar authority over an electric utility satisfied the active supervision requirement. 849 F.2d at 1334.

Although Trigen never directly addresses OG&E's argument that all of its regulated electricity sales are protected by the state action doctrine, Trigen does offer several reasons why the state action doctrine should not apply in this case. Trigen argues: (1) that "OG&E made improper payments to public officials, offered to provide discounted loans and construction-cost guarantees, disparaged Trigen, and lavishly entertained Trigen customers while sticking OG&E ratepayers with the bill," Aplee. Br. at 28; (2) that OG&E is competing in the cooling services market, which is unregulated, *id.* at 31; and (3) that OG&E misrepresented the RTP tariff, discriminated between customers in deciding who to enroll in the RTP pilot program, and has flexibility in setting RTP rates. *Id.* at 32-34. We will address each argument in turn.

1. Bribery, Conspiracy, and "Lavish Entertainment"

Trigen alleges OG&E used improper payments, undue influence, and lavish entertainment to gain business. Trigen does not spell out its legal argument here and cites to no

legal authority, but we construe Trigen as arguing that OG&E's alleged "bad acts" somehow destroy OG&E's state action immunity. However, the Supreme Court has expressly rejected this notion, holding that there is no conspiracy or bribery exception to state action immunity. *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 378-79 (1991) (stating that "Congress has passed other laws aimed at combating corruption in state and local governments," and that "any action that qualifies as state action is ipso facto . . . exempt from the operation of the antitrust laws") (internal quotations and citation omitted, alteration in original). We can find no legal authority, and Trigen points us to none, that dictates that OG&E's alleged "lavish entertainment" of customers causes OG&E to forfeit state action immunity. Therefore, even if OG&E had committed these alleged "bad acts," its state action immunity would remain intact.

2. Competition in the Unregulated Cooling Market

Trigen contends that OG&E is not entitled to state action immunity because OG&E is not participating in the regulated electricity market but in the unregulated cooling services market. We disagree. First, OG&E is selling only one thing -- electricity at state-regulated rates. It does *not* sell the electric chillers that are necessary for cooling. According to Trigen's logic, OG&E must be deemed a competitor, and a potential monopolist, in every single product market that uses electricity to the exclusion of the suppliers of that market. Clearly, this is an unreasonable result.

Second, the case Trigen relies on, *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976), is distinguishable. In *Cantor*, the Court held that a Michigan electric utility's program distributing free light bulbs was not immune from the Sherman Act, even though the light-bulb-distribution

program was included in the state-approved tariff, because there was no evidence that the state intended to regulate the electric light bulb market. *Id.* at 598. *Cantor* involved an electric utility that was distributing an unregulated product -- light bulbs. OG&E has done no such thing. OG&E only sells electricity -- at state-regulated rates.[1]

3. RTP Pilot Program

Finally, Trigen argues that OG&E has flexibility in setting its RTP rate and that this flexibility leads to "abuse" by OG&E, including misrepresentations and discriminatory withholding of the RTP rate. Aplee. Br. at 34-36. Specifically, Trigen argues that OG&E misrepresented the tariff to the City, and that OG&E unlawfully discriminated against its customers in deciding who to enroll in the pilot program. Aplee. Br. at 33. Trigen contends that OG&E's flexibility in determining the RTP rate means that the RTP rate is not actively supervised by the State and, therefore, outside the scope of state action. *Id.* at 33-34.

We disagree with Trigen's premise. OG&E has no discretion in setting its electricity rates. The RTP rate is governed by strict formulas defined in the OCC-approved tariff. Aplt. Reply Br. at 7. Under the RTP program, the *customer* is given discretion in determining his electricity rate by determining at what times of day to use electricity. Accordingly, OG&E could only offer the City an *estimate* put together by an outside consulting firm, based on certain assumed usage patterns.

Trigen's discrimination claim clearly is barred by the

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[1] At oral argument, Trigen's counsel argued that OG&E was able to manipulate its rates by offering inducements to the City such as financing packages and capital-cost guarantees for the construction of an on-site cooling plant. However, as OG&E points out, and Trigen concedes, the City declined these offers, Aplt. Br. at 19; Aplee. Br. at 8, leaving no justiciable issue before this court.

state action doctrine. In its approval of the RTP tariffs and pilot program, the OCC explicitly stated in its Final Order that "the proposed Day-Ahead and Week-Ahead Pricing Tariffs will not result in unjust or undue discrimination." III Aplt. Sep. Add. Ex. DX318 at 4. Even if the RTP program *did* result in discrimination, it would still be at the heart of the state action doctrine. The state action doctrine applies to immunize anticompetitive conduct from the federal antitrust laws when that conduct is undertaken pursuant to a clearly-articulated state policy that is actively supervised by the State. If Oklahoma wants to allow OG&E to discriminate in order to pursue a state policy and Oklahoma actively supervises the conduct at issue, than *[sic]* OG&E may discriminate and still fall within the bounds of the state action doctrine.

In sum, Trigen's arguments that OG&E's regulated electricity sales fall oustide of state action immunity are unpersuasive. Therefore, because OG&E is acting in accordance with a clearly-articulated state regulatory program and because it is actively supervised by the OCC, we hold that OG&E's conduct falls within the heart of the state action doctrine and that the federal antitrust claims must be dismissed.

B. The Remaining State Antitrust and Tort Claims

Next, we address Trigen's remaining state antitrust and tort claims. Because we construe all of Trigen's state law claims as collateral attacks on OG&E's filed rates, we hold that these claims are within the exclusive jurisdiction of the OCC. OG&E raises a narrower version of this argument on appeal, contending that only Trigen's state tort claims are within the exclusive jurisdiction of the OCC.[2] Aplt. Br. at 63-64. However, as we have an "independent obligation" to

[2] Trigen never responds to this argument.

determine our own jurisdiction, we raise this issue sua sponte. *FW/PBS, Inc. v. City of Dallas,* 493 U.S. 215, 231 (1990); *accord State Farm Mut. Auto Ins. Co. v. Narvaez,* 149 F.3d 1269, 1270-71 (10th Cir. 1998).

Oklahoma law subjects all grievances with tariffs to the exclusive jurisdiction of the OCC. The OCC has the powers of a "court of record," and must "enforce compliance with any of its lawful orders or requirements . . . ." Okla. Const. art. IX, § 19. "The authority of the [OCC] . . . to prescribe rates . . . [and] charges, . . . for transmission companies, shall . . . be paramount . . . ." Okla. Const. art. IX, § 18. An appeal from an order of the OCC "affecting the rates, charges, services, practices, rules or regulations of public utilities . . . shall be to the Supreme Court [of Oklahoma] only . . . ." Okla. Const. art. IX, § 20. Finally, plaintiffs who bring lawsuits or collateral proceedings against public utilities may not question the "reasonableness, justness, or validity of any rate, charge, service, practice, rule, regulation or requirement . . . prescribed by the [OCC] . . . ." Okla. Const. art. IX, § 24.

The Supreme Court of Oklahoma has made clear that it is willing to look behind the form in which an action is brought to determine whether the action is actually a collateral attack on rates. *See Wilson v. Harlow,* 860 P.2d 793, 800-01 (Okla. 1993) (holding that a petition styled as a negligence and intentional tort action was in reality a collateral attack on rates and, therefore, within the exclusive jurisdiction of the OCC). In this case, in each of the trhee competitive incidents of which Trigen complains, the heart of Trigen's complaint is that OG&E's rates are too low and that Trigen either had to lower its own rates in response or lose business. The only remedy Trigen seeks is "lost profits" as damages from OG&E. Therefore, we conclude that Trigen's state antitrust and tort claims are in fact collateral attacks on OG&E's filed rates, and that such attacks lie within the exclusive jurisdiction of the OCC.

We REVERSE the judgment and the case is remanded with directions to DISMISS the complaint. OG&E's motion to supplement the record is denied.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

TRIGEN-OKLAHOMA CITY ENERGY CORPORATION,

Plaintiff,

v.

OKLAHOMA GAS & ELECTRIC COMPANY,

Defendant.

No. CIV-96-1595-L

AMENDED JUDGMENT
[filed January 25, 2000]

This action came on for trial before the court and a jury, Honorable Tim Leonard, United States District Judge, presiding. The issues have been duly tried and the jury has duly rendered its verdict. In accordance with the jury's verdict and in keeping with the court's order of this date regarding damages,

IT IS ORDERED AND ADJUDGED that plaintiff Trigen-Oklahoma City Energy Corporation shall have and recover on its claims against defendant Oklahoma Gas & Electric Company as follows:

On plaintiff's claims for (1) monopolization in violation of § 2 of the Sherman Act, (2) unreasonable restraint of trade

in violation of Oklahoma's antitrust laws, and (3) discrimination in violation of Oklahoma's antitrust laws, and treble damages pursuant to 15 U.S.C. § 15, the sum of **$20,462,322.00**;

On plaintiff's tort claim, the sum of **$179,226.00**;

For a **total judgment in the amount of $20,641,548.00.**

IT IS FURTHER ORDERED AND ADJUDGED that plaintiff shall have and recover interest thereon at the rate as provided by law, and the costs of the action pertaining to these claims.

Entered this 25th day of January, 2000.

/s/ Tim Leonard
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

TRIGEN-OKLAHOMA CITY ENERGY CORPORATION,

Plaintiff,

v.

OKLAHOMA GAS & ELECTRIC COMPANY,

Defendant.

No. CIV-96-1595-L

ORDER
[filed January 25, 2000]

This matter is before the court on several post-trial motions of the parties. After a lengthy trial to the jury, a verdict was rendered in favor of plaintiff Trigen-Oklahoma City Energy Corporation on its antitrust and tort claims and against defendant Oklahoma Gas & Electric Company. On February 19, 1999, judgment was entered by the court in accordance with the jury's verdict, which included a punitive damages award in the amount of 10 million dollars. In its order of the same date, the court noted that the judgment did not include statutory treble damages, but that the court would consider awarding statutory damages on plaintiff's antitrust claims if presented with a timely filed post-trial motion

showing that such damages would not represent impermissible duplicate damages.

Defendant has filed a Motion for Judgment as a Matter of Law to which plaintiff has responded. Judgment as a matter of law is proper "only if the evidence points but one way and is susceptible to no reasonable inference which may support the opposing party's position." *Q.E.R., Inc. v. Hickerson,* 880 F.2d 1178, 1180 (10th Cir. 1989). In ruling on the motion for judgment as a matter of law, the court must view the evidence and the inferences in the light most favorable to the plaintiff, the nonmoving party. *Aguinaga v. United Food & Commercial Workers Int'l,* 993 F.2d 1463, 1469 (10th Cir. 1993), *cert. denied,* 114 S. Ct. 880 (1994). Based on this standard, the court concludes that defendant's motion for judgment as a matter of law must be denied. Notwithstanding defendant's arguments to the contrary, there was sufficient evidence when viewed in the light most favorable to plaintiff to support the jury's verdict. The court is not to rewrite the evidence, consider the credibility of witnesses or substitute its judgment for that of the jury. *Joyce v. Atlantic Richfield Co.,* 651 F.2d 676, 680 n.2 (10th Cir. 1981). Thus, defendant's Motion for Judgment as a Matter of Law should be and hereby is denied.

Both parties have filed motions to alter or amend the judgment pursuant to Fed. R. Civ. P. 59(e). Plaintiff seeks to obtain the maximum judgment possible without duplication of damages. Defendant asserts that plaintiff is not entitled to any damages at all. Defendant argues that if judgment is entered in plaintiff's favor it should (1) eliminate a duplicative award of actual damages to plaintiff, (2) prevent an award of actual damages to plaintiff in an amount exceeding the amount of actual damages requested by plaintiff at trial, and (3) prevent a duplicative award of punitive and treble damages. Defendant expands upon these arguments further in its response to plaintiff's motion to alter or amend and argues that plaintiff's "arithmetic gymnastics"

cannot salvage the "ambiguous" verdict of the jury.

The court has consistently acknowledged its intent and duty to see that the judgment does not include an impermissible duplicative recovery or windfall to plaintiff. The process of conforming the jury's verdict to a proper judgment does not render the jury's verdict ambiguous as defendant claims, however.[1] No party has suggested that the jury should have been allowed or required to consider the issue of treble damages on plaintiff's antitrust claims. The matter of trebling damages on these claims is for the court. As for the claims that were properly submitted to the jury, the court has already found that sufficient evidence was presented at trial to support the jury's verdict. The court's task is to enter a proper judgment on the evidence that was presented at the trial, recognizing that plaintiff may not recover both punitive damages under a state tort law claim and treble damages under a federal statutory claim, where the state and federal claims arise from the same operative facts and merely represent alternative theories of recovery. *Mason v. Oklahoma Turnpike Authority,* 115 F.3d 1442, 1459 (10th Cir. 1997).

Upon consideration of all the evidence that was presented at trial, and upon consideration of the arguments of the parties pertaining to the duplicative damages issue, the court finds that plaintiff's antitrust and tort claims awards are indeed based upon the same operative facts and that an award of both treble and punitive damages should not be permitted. Although, with the benefit of hindsight, it is possible to connect disparate elements of some of the claims with separate items of damage, the evidence at trial demonstrated that plaintiff's antitrust and tort claims consisted of alternative theories of recovery and were based

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[1] By failing to make a proper objection before the jury was discharged, defendant has arguably waived any argument that the jury verdict was ambiguous. *See Unit Drilling Company v. Enron Oil & Gas Company,* 108 F.3d 1186, 1191 n.6 (10th Cir. 1997).

on the same underlying conduct. Plaintiff's request to include both treble damages and punitive damages in the judgment is therefore denied.

The maximum amount of actual antitrust damages (*i.e.*, damages before trebling) awarded by the jury is $6,820,774.00. The jury awarded in excess of this amount on one of plaintiff's tort claims (tortious interference with prospective economic advantage). Upon the evidence presented at trial, then, it is reasonable to find that the amount in excess of the antitrust award (*i.e.*, $179,226.00) is not duplicative of the antitrust damages. Accordingly, a proper judgment should include actual antitrust damages in the amount of $20,462,322.00 ($6,820,774.00 trebled pursuant to 15 U.S.C. § 15), and an additional award in the amount of $179,226.00, representing the difference between the high tort claim award and the actual antitrust award, for a total judgment for plaintiff in the amount of $20,641,548.00. The court's amended judgment in this amount will issue on a separate document in accordance with the Federal Rules of Civil Procedure.

The court finds that defendant's Motion for New Trial should also be denied. A new trial may be granted when the verdict is against the evidence or when prejudicial error has entered the record. *McHargue v. Stokes Division*, 912 F.2d 394, 396 (10th Cir. 1990). The court is thoroughly familiar with the record and proceedings at trial. Upon consideration of defendant's motion and plaintiff's response, and mindful of the standard for granting a new trial, the court concludes that a new trial is not warranted. In this connection, the court finds that the additional materials sought to be submitted by defendant would not alter the court's conclusion that a new trial is not warranted. Accordingly, defendant's Motion for a New Trial is denied and defendant's request for leave to submit additional authority to the court is also denied.

In summary, defendant's Motion for Judgment as a

Matter of Law [Doc. No. 173-1] is DENIED. The parties' cross-motions to Alter or Amend the Judgment [Doc. Nos. 168 & 172] are GRANTED IN PART and DENIED IN PART as more fully set forth above. Defendant's Motion for New Trial [Doc. No. 173-2] is DENIED. Defendant's Application for Leave to Submit Notice to the Court of Additional Authority [Doc. No. 193] is also DENIED.

It is so ordered this 25th day of January, 2000.

/s/ Tim Leonard
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Nos. 00-6047 and 00-6068

TRIGEN-OKLAHOMA CITY ENERGY CORPORATION,

Plaintiff-Appellee/Cross-Appellant,

v.

OKLAHOMA GAS & ELECTRIC COMPANY,

Defendant-Appellant/Cross-Appellee,

EDISON ELECTRIC INSTITUTE,

Amicus Curiae.

ORDER
filed May 1, 2001

Before KELLY and BRISCOE, Circuit Judges, and MURGUIA, District Judge*.

The petition for rehearing filed by Trigen-Oklahoma City

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* The Honorable Carlos Murguia of the United States District Court for the District of Kansas, sitting by designation.

Energy Corporation is denied by the panel that rendered the decision.

The suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. No member of the panel and no judge in regular active service requested that the court be polled on rehearing en banc so the suggestion for rehearing en banc is also denied.

Entered for the Court

Patrick Fisher, Clerk of Court

By /s/ Opal A. Carter
Deputy Clerk

APPENDIX E

CONSTITUTIONAL AND STATUTORY PROVISIONS

Federal Statutes

15 U.S.C. § 2 provides:

> Monopolizing trade a felony; penalty
>
> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 15 provides in relevant part:

> (a) * * * any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee . . . .

Oklahoma Constitutional Provisions

Article IX, § 18 of the Oklahoma Constitution provides:

> Powers and duties -- Notice before taking action -- Process for witnesses -- Authority of Legislature -- Municipal powers.
>
> The [Corporation] Commission shall have the power and authority and be charged with the duty of supervising, regulating and controlling all transportation and transmission companies doing business in this State, in all matters relating to the performance of their public duties and their charges therefor, and of correcting abuses and preventing unjust discrimination and extortion by such companies; and to that end the Commission shall, from time to time, prescribe and enforce against such companies, in the manner hereinafter authorized, such rates, charges, classifications of traffic, and rules and regulations, and shall require them to establish and maintain all such public service, facilities, and conveniences as may be reasonable and just, which said rates, charges, classifications, rules, regulations, and requirements, the Commission may, from time to time, alter or amend. All rates, charges, classifications, rules and regulations adopted, or acted upon, by any such company, inconsistent with those prescribed by the Commission, within the scope of its authority, shall be unlawful and void. The commission shall also have the right, at all times, to inspect the books and papers of all transportation and transmission companies doing business in this State, and to require from such companies, from time to time, special reports and statements, under oath, concerning their business; . . . and shall, from time to

time, make and enforce such requirements, rules, and regulations as may be necessary to prevent unjust or unreasonable discrimination and extortion by any transportation or transmission company in favor of, or against any person, locality, community, connecting line, or kind of traffic, in the matter of car service, train or boat schedule, efficiency of transportation, transmission, or otherwise, in connection with the public duties of such company. Before the Commission shall prescribe or fix any rate, charge or classification of traffic, and before it shall make any order, rule, regulation, or requirement directed against any one or more companies by name, the company or companies to be affected by such rate, charge, classification, order, rule, regulation, or requirement, shall first be given, by the Commission, at least ten days' notice . . . . The authority of the Commission (subject to review on appeal as hereinafter provided) to prescribe rates, charges, and classifications of traffic, for transportation and transmission companies, shall, subject to regulation by law, be paramount; but its authority to prescribe any other rules, regulations or requirements for corporations or other persons shall be subject to the superior authority of the Legislature to legislate thereon by general laws . . . .

Article IX, § 19 of the Oklahoma Constitution provides:

Powers of court of record -- Additional powers -- Failure or refusal to obey orders.

In all matters pertaining to the public visitation, regulation, or control of corporations, and within the jurisdiction of the Commission, it shall have the

powers and authority of a court of record, to administer oaths, to compel the attendance of witnesses, and the production of papers, to punish for contempt any person guilty of disrespectful or disorderly conduct in the presence of the Commission while in session, and to enforce compliance with any of its lawful orders or requirements by adjudging, and by enforcing its own appropriate process, against the delinquent or offending party or company (after it shall have been first duly cited, proceeded against by due process of law before the Commission sitting as a court, and afforded opportunity to introduce evidence and to be heard, as well against the validity, justness, or reasonableness of the order or requirement alleged to have been violated, as against the liability of the company for the alleged violation), such fines or other penalties as may be prescribed or authorized by this Constitution or by law. The Commission may be vested with such additional powers, and charged with such other duties (not inconsistent with this Constitution) as may be prescribed by law, in connection with the visitation, regulation, or control of corporations, or with the prescribing and enforcing of rates and charges to be observed in the conduct of any business where the State has the right to prescribe the rates and charges in connection therewith, or with the assessment of the property of corporations, or the appraisement of their franchises, for taxation, or with the investigation of the subject of taxation generally . . . .

Article IX, § 20 of the Oklahoma Constitution provides:

Appeals to Supreme Court -- Other courts to have no jurisdiction -- Mandamus and prohibition.

From any action of the Corporation Commission prescribing rates, charges, services, practices, rules or regulations of any public utility or public service corporation, or any individual, person, firm, corporation, receiver or trustee engaged in the public utility business, an appeal may be taken by any party affected, or by any person deeming himself aggrieved by any such action, or by the State, directly to the Supreme Court of the State of Oklahoma, in the manner and in the same time in which appeals may be taken to the Supreme Court from the District Courts, except that such an appeal shall be of right . . . .

An appeal from an order of the Corporation Commission affecting the rates, charges, services, practices, rules or regulations of public utilities, or public service corporations, shall be to the Supreme Court only, and in all appeals to which the State is a party it shall be represented by the Attorney for the Corporation Commission, and the Attorney General, or his duly authorized representative. * * *

No court of this State, except the Supreme Court, shall have jurisdiction to review, affirm, reverse, or remand any action of the Corporation Commission with respect to the rates, charges, services, practices, rules or regulations of public utilities, or of public service corporations, or to suspend or delay the execution or operation thereof, or to enjoin, reverse, or interfere with the Corporation Commission in the performance of its official duties; provided, however, that writs of mandamus or prohibition shall lie from the Supreme Court to the Corporation Commission in all cases where such writs respectively would lie to any inferior court or officer.

Article IX, § 24 of the Oklahoma Constitution provides:

> Right of Action Not Affected -- Questioning Action of Commission.
>
> The right of any person, firm, corporation, receiver or trustee to institute and prosecute in the ordinary courts of justice, any action, suit or motion against any public utility, or public service corporation, or any individual, person, firm, corporation, receiver or trustee, engaged in the public utility business, shall not be extinguished or impaired by reason of any fine or other penalty which the Corporation Commission may impose or be authorized to impose upon such public utility, public service corporation, or any individual, person, firm, corporation, receiver or trustee engaged in the public utility business, because of its breach of any public duty or because of its failure to comply with any order or requirement of the Corporation Commission; but in no such proceeding by any person, firm, corporation, receiver or trustee, against such public utility, public service corporation, or any individual, person, firm, corporation, receiver or trustee engaged in the public utility business, nor in any collateral proceeding, shall the reasonableness, justness, or validity of any rate, charge, service, practice, rule, regulation or requirement, theretofore prescribed by the Corporation Commission, within the scope of its authority, and then in force, be questioned.

Oklahoma Statutes

17 Okla. Stat. § 152 provides:

> Commission's Jurisdiction Over Public Utilities -- Examination of requests for review of rates and charges.
>
> A. The Commission shall have general supervision over all public utilities, with power to fix and establish rates and to prescribe and promulgate rules, requirements and regulations, affecting their services, operation, and the management and conduct of their business; shall inquire into the management of the business thereof, and the method in which same is conducted.
>
> B. 1. When any public utility subject to general supervision pursuant to this section or to Section 158.27 of this title shall file with the Commission a request for review of its rates and charges, such request shall be given immediate attention.
>
> 2. In the exercise of this responsibility, the Commission shall complete any examination of such request for a review of its rates and charges within one hundred twenty (120) days from the date such application for review of its rates and charges is filed.
> * * *
>
> C. The Commission shall have full visitorial and inquisitorial power to examine such public utilities, and keep informed as to their general conditions, their capitalization, rates, plants, equipments, apparatus, and other property owned, leased, controlled or operated, the value of same, the

management, conduct, operation, practices and services; not only with respect to the adequacy, security and accommodation afforded by their service, but also with respect to their compliance with the provisions of this act, and with the Constitution and laws of this state, and with the orders of the Commission.